BERTHLYN JANE BAKER

IBLA 79-63 Decided June 27, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management rejecting in part, Native allotment application F-17749.

Affirmed.

1. Patents of Public Lands: Effect

> The effect of the issuance of a patent, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to remove from the jurisdiction of the Department consideration of all disputed questions concerning rights to the land.

APPEARANCES: Richard E. Olson, Jr., Esq., Alaska Legal Services, for appellant; Barbara J. Miracle, Esq., Assistant attorney General, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Berthlyn Jane Baker has appealed to this Board from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 28, 1978, which rejected in part her Native allotment application for parcel a, sec. 13, T. 18 N., R. 12, E., Copper River Meridian Alaska. The stated reason for rejection was the subject land is located entirely within those lands conveyed by patent numbers 50-65-0354 and 1224940, and therefore, is not subject to disposal under the public land laws.

The record shows that appellant claimed use of parcel "A" in her application beginning June 1961. On appeal she now has changed her alleged beginning date of occupancy to 1959. The State of Alaska

received patent to a portion of this land August 11, 1974, in Patent No. 50-65-0354. 1/

Appellant now claims Native occupancy predating the filing of the State selection February 2, 1960, and the issuance of the State's patent in 1974. Appellant's position is that her prior occupancy entitles her to the lands, and she requests that the Department seek the cancellation of the patent claimed to have been erroneously issued to the State in dereliction of the Department's obligation to her. Appellant argues that the lands in question were not available for selection by the State under the provisions of the Alaska Statehood Act because her prior Native occupancy prevented the lands from being "vacant, unappropriated, and unreserved at the time of their selection."

The State of Alaska responds that the Board should not seek cancellation of these patents because once lands have been patented they are no longer unappropriated lands of the United States and applications covering such lands must be rejected.

[1] The State's contention is correct. Where lands have been patented, they are no longer unappropriated lands of the United States and applications covering such lands must be rejected. The effect of the issuance of a patent is to transfer the legal title from the United States and to remove from the jurisdiction of the Department the consideration of all disputed questions concerning the rights to lands. State of Alaska, 35 IBLA 140 (1978); Fernie M. Rogers, 29 IBLA 192 (1977); Nadja Davis Gamble, 23 IBLA 128 (1975); Basille Jackson, 21 IBLA 54 (1975); Ethel Aguilar, 15 IBLA 30 (1974); Bryan N. Johnson, 15 IBLA 19 (1974); Norman M. Rehy, Sr., 13 IBLA 191 (1973); Dorothy H. Marsh, 9 IBLA 113 (1973); Clarence March, 3 IBLA 261 (1971); Everett Elvin Tibbets, 61 I.D. 397 (1964). This is true even if the patent has been issued by mistake or inadvertence. State of Alaska, supra. See Germania Iron Co. v. United States, 165 U.S. 379 (1897).

Accordingly, since all the lands involved have previously been patented, we decline to delve further into the merits of appellant's claims or the discrepancies of the different dates of her claimed use and occupancy. The Board, lacking jurisdiction, could only investigate further for the purpose of deciding whether it should make a recommendation to litigate. If appellant wishes to press her assertions further, she may take the matter up with the Office of the Solicitor, the Department's office in charge of litigation matters. Fernie M. Rogers, supra. Ethel Aguilar, supra.

1/ The State notes on appeal that Patent No. 1224940 is not a State patent and apparently the holder of the patent has not been named or served a copy of the original decision.

Therefore, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

41 IBLA 241

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

I agree this appellant's Native allotment application must be rejected since the land in issue has been patented. But I do not believe that it is appropriate for this Board to abdicate its responsibility of determining whether it should recommend to the Solicitor the commencement of such by the Attorney General.

In Dorothy H. Marsh, 9 IBLA 113 (1973), we stated in the syllabus as follows:

> The Department will not ordinarily recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. Where such considerations are present it is proper for this Board to recommend to the Solicitor such referral to the Attorney General.

In Marsh, we recommend to the Solicitor that he request the Attorney General to initiate suit. In the case at bar, I am not confident that "significant equitable considerations are involved," particularly in the light of the change in appellant's posture concerning the facts surrounding the initiation of her claim. While I believe that the facts here do not warrant the same recommendation we made in Marsh, the criteria enunciated in that case should not be ignored.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING

The opinion of Judge Stuebing correctly notes that the effect of issuance of a patent is to transfer legal title from the United States. There is no difficulty with this premise. My problem develops in attempting to reconcile the additional conclusion, viz., that patent issuance removes from the jurisdiction of the Department the consideration of all disputed questions concerning the rights to land with various cases such as Dorothy H. Marsh, 9 IBLA 113 (1973) and Sky Pilots of Alaska, Inc., 40 IBLA 355 (1979), wherein this Board has asserted the authority to examine the circumstances of the issuance of the patent or actions carried out under it and make declarations as to the efficacy of the patent and recommendations that the Department pursue the judicial cancellation of the same. It is clear that in both those cases the Board, while recognizing the existence of a patent, nevertheless examined the rights emanating therefrom.

I agree with Judge Fishman that the Board has an affirmative obligation to examine the circumstances of the issuance of a patent, particularly where, as here, the patent as a procedural matter should not have issued until BLM had acted upon the simultaneously pending Native allotment application.

I disagree with Judge Fishman, however, in that I feel that this Board has no alternative but to order the State of Alaska to contest the Native allotment application. 1/

Initially, it must be noted that land occupied by Natives was not, at least until the passage of the Alaska Native Claims Settlement Act, available for State selection. Compare State of Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert. denied 397 U.S. 1067 (1970); Edwardsen v. Morton, 369 F. Supp. 1339 (D. D.C. 1973), with United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 197).

1/ Judge Fishman's reliance on the change in the alleged date of appellant's occupancy appears misplaced. I would agree that had appellant changed her date of claimed occupancy from one after the State selection to one before, this might give rise to proper questions. In this case, however, appellant's original application alleged occupancy from June 1961. The date of the State selection was July 27, 1961. Appellant's affidavit of October 16, 1978, in which she declared that she has used the land from 1959 does not change the legal character of her original application. She had already alleged occupancy prior to the withdrawal effectuated by the State selection.

In any event, such matters are best resolved in the context of a hearing, wherein the trier of fact can ascertain the true circumstances surrounding the attempted change in the date of claimed occupancy.

Native occupancy, even if insufficient to qualify for an allotment under the Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), would bar a State selection. See Lucy S. Ahvakana, 3 IBLA 342, 344 (1971).

Moreover, under the decisions of the Ninth Circuit Court of Appeals in Pence v. Kleppe, 592 F.2d 135 (1976), and this Board in Donald Peters, 26 IBLA 235 (1976), no Native allotment application can be rejected on the basis of a disputed issue of fact without notice and an opportunity for hearing. It is true that where a decision to reject a Native allotment is premised on a purely legal determinant no hearing is required. But I must admit difficulty in following the logic of a procedure which rejects an allotment application on the basis of an issued patent where the correctness of the issuance of the patent is disputed, without ever affording the Native allotment applicant an opportunity to show his entitlement.

If this Department has erroneously issued the patent to the State in derogation of appellant's rights, it seems only elementary justice that the Department should bear the economic burdens attendant to a suit to cancel the patent. A hearing is essential before the Department can make an informed judgment as to the merits of appellant's application. Accordingly, I would reverse the decision below rejecting the Native allotment application, order the State Office to hold further action on the application in abeyance and direct the State of Alaska to bring a contest against the allotment applicant. Should the State of Alaska decline, I would recommend that the Solicitor's Office undertake discussions with the Justice Department with a view towards the initiation of suit to cancel Patent Nos. 50-65-0354 and 1224940, to the extent of the conflict between the patents and the allotment application.

James L. Burksi
Administrative Judge